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THE POLITICS OF INDIGENOUS PARTICIPATION THROUGH 'FREE PRIOR AND INFORMED CONSENT': REFLECTIONS FROM THE BOLIVIAN CASE¹

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Abstract

This article explores the challenges of ethnic-based participation and its potential for creating inclusive and effective forms of decision-making for marginalized social groups. Empirically, it examines a recent attempt to establish more participative forms of resource and development governance for indigenous communities in Bolivia through Free Prior and Informed Consent/Consultation (FPIC). Rooted in international human rights law, FPIC aims at achieving more effective bottom-up participation by establishing an obligation to consult - or obtain the consent of - indigenous peoples before large development projects and legal reforms that would affect them can proceed. Interest in FPIC initiatives has been growing for reasons that range from efforts to build more equitable management of natural resources to attempts to introduce more effective local-scale practices of participation and active citizenship. We argue that the idea of prior consultation and FPIC itself are not neutral instruments; they will not automatically lead to better or more democratic governance and a more equal society. The way in which FPIC is currently being implemented and framed in Bolivia is in tension with broader ideas of representation and legitimacy, inclusiveness and management of public and common goods because there is no real clarity as to who is entitled to participation, why they do and whether they are doing so as a corrective to exclusion, a promotion of citizenship or as a mechanism for redistribution. As we show here, FPIC implementation can have unintended consequences and consultation can sometimes embed existing social, cultural and economic tensions. The paper eventually offers some broader reflections on participatory governance and collective rights especially in relation to the tensions between inclusive participation and exclusive rights or – put differently - the challenges for building cultures of participation and inclusion in complex and ethnic diverse democracies.

Keywords: FPIC, participation, indigenous rights, natural resources, ethnicity, Bolivia.

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Democracy in Latin America is both stable and stale. Democratization has certainly institutionalized party competition, but the introduction of electoral politics since the 1990s has proved of limited value in terms of encouraging activist participation and even in its capacity to ‘represent’ the interests and opinions of the majority of citizens across the region (Fung and Wright, 2001). One consequence is a growing awareness within international organizations that new ways are needed to encourage bottom-up forms of political engagement, if democracy is to take deeper root in the region (Eberly, 2000; Maxwell et al., 2012; Faguet, 2014). As a result, attention is shifting to initiatives that seek to deepen community democratic participation and practices of citizenship (Eversole et al., 2005; Gaventa, 2006; Selee and Peruzzotti, 2009; Sen, 1999). The importance of strengthening community participation is recognized in particular in ethnically divided polities such as those that can be found in Andean America.

The rising interest in new forms of direct participation in Latin America is distinctive in that the participatory imperative has become embedded within a dominant neoliberal political economy. Multiculturalism and ethnic-based politics, around which enhanced or novel forms of participation have been shaped, in the Andean region in particular, did not prove easy partners for neoliberal politics. Indigenous claims for collective (rather than individual) rights and for territorial autonomy raised what Deborah Yashar (1999: 96) rightly called a “postliberal challenge” to regional models of democracy. As Yashar (1999) argues, indigenous rights claims question the idea that democracy corresponds to the pursuit of individualized citizenship and demand the recognition of non-traditional rights and institutions that reflect the existence of ethnically defined forms of citizenship within nation-states. Recognizing collective, indigenous rights also constitutes a challenge for the participation agenda – who is to speak, for whom and with what legitimacy? The embrace of indigenous rights thus carries with it the potential to amplify the voice of a traditionally marginalized group in and, therefore, to play a role in strengthening democracy, *and* to raise questions as to whether it enhances the rights, and resources of all citizens, whatever their ethnicity.

The tensions around collective rights, participatory governance and democratization are the subject of this article. In particular, we explore the challenges of ethnic-based participation and its potential for creating inclusive and effective forms of decision-making for marginalized social groups. Empirically, we examine a recent attempt to establish more participative forms of governance for indigenous communities in Bolivia, where ethnicity has historically been one of the principal political and social cleavages, through the Free Prior and Informed Consent/Consultation (FPIC)². Rooted in international human rights law, this

² In academic and international literature, both concepts and acronyms of “free prior and informed consent” (FPIC) (UN-REDD, 2013; Ward, 2011; Sunderlin et al., 2014) and, more rarely, “free, prior and informed consultation” (FPICon) (Caruso et al., 2003; MacKay, 2005; Griffiths, 2005; Goodland 2004; ILO, 2013) are used, not always in a consistent way, to identify more or less demanding participation mechanisms for indigenous peoples. In this paper we use the acronym FPIC to refer to both mechanisms of consultation and consent, following Goodland’s (2004) idea that ‘meaningful participation’ and accept his view that consultation would lead to consent, if applied in good faith.

framework aims at achieving more effective bottom-up participation by establishing an obligation to consult - or obtain the consent of - indigenous peoples before large development projects and legal reforms that would affect them get underway (Goodland, 2004). Ultimately, we argue that the FPIC alone does not, and may not be able to, resolve issues of democratic inclusion and participation. Instead it opens up different kinds of political conflicts, between social groups and between society and the state, which do not necessarily lead to fairer outcomes in terms of social justice.

The paper proceeds as follows. After a discussion of the significance of participation for democracy and the ethnic-based participatory turn in Latin America, we outline the FPIC framework in the context of the agenda of indigenous rights. We then identify some of the most contentious issues that characterize the process of 'translation' of FPIC from international to domestic law that, as we see it, will inevitably affect how FPIC actually works. They include: a) who is the subject of the rights being claimed, b) how those rights can be operationalized, c) the procedures that should be put in place to ensure collective consultation and d) the practice of collective compensation for policies that breach those rights. A discussion of FPIC itself as a mechanism of participatory governance and its operation in Bolivia follows. FPIC is, we argue, different from other experiments in participation such as neighborhood councils, stakeholders' and workers' committees, participatory budgeting programs and village-based governance that have flourished in recent years (Fung and Wright, 2001) in that is: rooted in international norms, suggesting potentially more leverage for implementation but also the risk of thin contextual fitness; only relevant as a mechanism for participation for ethnically defined communities, thereby embedding a powerful exclusionary, as well as inclusionary, ontology; relevant principally for development projects and natural resource management, as if issues and practices of power can be meaningfully separated by sector; and often operated via strategic bargaining rather than inclusive deliberation, with limited potential, therefore, to shape local institutions and embed participation within them. In the conclusion, we offer some broader reflections on participatory governance and collective rights especially in relation to the tensions between inclusive participation and exclusive rights or – put differently - the challenges for building cultures of participation and inclusion in complex and fragile democracies.

The article is based on original data. Around 30 interviews were carried out in Bolivia with a variety of actors: leaders of the main social organizations involved in this debate (mainly indigenous/native organizations and peasant unions³), representatives of non-governmental organizations (NGOs) and international

Moreover, this is consistent with the fact that in Spanish only one concept is commonly used– *Consulta Libre Previa e Informada* – which, while literally translates FPICon, in practice is often used also to indicate consent (*consentimiento*) and, more broadly, new consultative mechanisms for indigenous peoples. Our arguments and conclusions are generally applicable to ethnic-based consultation mechanisms in general (whether or not consent is a requirement). See section 3 for detailed discussion of FPIC and FPICon.

³ Confederación Unica de Trabajadores Campesinos de Bolivia (CSUTCB), Confederación de Pueblos Indígenas de Bolivia (CIDOB) and the Cosejo Nacional de Ayllus y Markas del Qullasuyu (CONAMAQ).

development agencies particularly active on indigenous peoples rights agenda (e.g. Danish Cooperation DANIDA, IBIS, Fundación Tierra, Ciudadanía, Centro de Estudios Jurídicos e Investigación Social CEJIS, the network Ciudadanos por el TIPNIS), international organizations' officers (International Labour Organization ILO, United Nations Office of the High Commissioner for Human Rights UNOHCHR, United Nations Development Programme UNDP), and civil servants and ministers, in particular from the Ministry of Government and the Ministry of Autonomies which were directly involved with FPIC discussions. Participant observation in official and informal meetings about FPIC was also conducted as well as in-depth analysis of preliminary proposals and law drafts. Fieldwork in Bolivia was carried out between July and August 2013 during the final round of consultations on the FPIC Law. A short field trip was also conducted at the ILO headquarter in Geneva to gather views on FPIC from the United Nations body in charge of its regulation and promotion.

The Participatory Turn and its Critics

There is no single model for encouraging participatory governance in the global South. Participatory approaches include decentralization of institutions, consultations and the introduction of spaces for democratic deliberation and discursive participation. Decentralization processes aim at triggering an institutional transition from hierarchical, bureaucratic mechanisms of top-down management to a “system of nested self-governments characterized by participation and cooperation” (Faguet, 2014: 2). Arguments in favor of decentralization include making governments more accountable, reducing corruption and the abuse of power, increasing political competition, and improving political stability by providing minority groups with greater access over subnational institutions and resources (Faguet, 2014). The introduction of new forms of deliberation, in contrast, is about limiting the risks of “political domination by rendering states accountable to (some of) the citizenry” (Fraser, 1990: 59). Drawing on ideas of deliberative democracy, spaces of debate and consultation are created in order to provide a collective holding to account of leaders and encourage discussion as a way of reaching decisions (Abelson et al., 2003; Chambers, 2003). Both democratic deliberation and decentralization share a concern with strengthening democratization processes whether through top-down institutional reforms or bottom-up voice practices. For this reason they can be thought of as complementary, not as alternatives, to more traditional forms of representative democracy.

If calls for more participatory governance were originally intended to address the democratic deficit, they were quickly taken up by the development planning community, not just in Latin America but across the global South (Bryld, 2001; Hickey and Mohan, 2004; Parfitt, 2004). Development initiatives that try to involve local communities in decision-making processes are frequently funded and supported by international agencies and they are standardly seen as a more efficient way to get things done than working through state institutions (Mato, 2000). The environmental

sector has proved particularly receptive to the introduction of participatory planning partly because of the added value that local and community actors are thought to bring in terms of local and socially-embedded forms of knowledge in relation to resource management and the commitment to equitable, rather than market-driven, solutions to environmental management (Agrawal, 2003; Agrawal and Ribot, 1999; Gibson et al., 2000).

But, despite endorsements from international organizations and planners, questions have been raised about the value of the participatory turn. Cooke and Kothari (2001) expressed some skepticism early on as to whether organized participation genuinely contributes to the quality of democracy or shape more inclusive decision-making in development planning. They took the view that participation was often used as a mechanism to legitimize, not challenge, the actions of large development agencies such as the World Bank, and had very little emancipatory and inclusive impact at the grassroots. Part of the problem, they suggested, was that participation was increasingly deployed in the service of a fundamentally conservative neoliberal development agenda. Without policies to reduce economic inequalities, the introduction of tokenistic forms of participation or 'invited' participation was meaningless (Cooke and Kothari 2001, Mirafteb, 2003). It was also suggested that encouraging formalistic participation would undermine or neutralize the original counter-hegemonic potential within concepts of participation (Leal, 2007). Empirical evidence for this critique emerged from studies of public deliberation mechanisms that suggested that they are often unrepresentative, subject to conscious manipulation and unconscious bias, and disconnected from actual decision-making (Delli Carpini et al., 2004).

Other critiques have followed. It has become clear, for example, that the standardized methods of participation that are deployed by governments and international organizations generally fail to appreciate the importance of place and context (Bryld, 2001). Standardized approaches also tend to take an optimistic – and unrealistic – view on civil society, which they see as homogenous, unified, inclusive and intrinsically 'civil', despite evidence to the contrary (Ehrenberg, 1999; Lane, 2003). And, whilst it is often assumed that decentralization will mediate political tensions by institutionalizing them at the local level and neutralizing the possibilities of anti-systemic mobilization (Diamond et al., 1995; Hechter, 2000), there is, in fact, a risk that the new local institutions might cement and even magnify existing social and ethnic cleavages (Masaki, 2010; Myerson, 2014). This risk is greater in circumstances where participatory governance institutionalizes identity-based systems of resource allocation in contexts characterized by endemic poverty and marginalization.

From Neoliberal Democracies to Plurinational States: Ethnicity and Participation in Latin America

The participatory turn has been hugely significant for how democratization has

unfolded in those countries of Latin America where ethnic cleavages are significant. Although the politics of the ballot-box was well established across Latin America by the middle of the 1990s, (Seligson, 2007) and democratic institutions reasonably solid, popular dissatisfaction with the exclusionary nature of new democracies was also evident. With the new millennium, a wave of social mobilizations and claim-making led by a wide range of ethnic groups and international movements (including human rights organizations, scholars, churches, and environmentalists) sympathetic with the indigenous cause introduced important challenges to the democratization process (Le Bot, 2009; Engle, 2010). At the same time, international NGOs and donors, which have traditionally wielded influence over development and democratization processes in Latin America, and whose authority was strengthened as democratic governments sought to align their own policies with international agendas on human rights, encouraged political leaders to consider the domestic value of cultural and ethnic diversity (Barsh, 1994; Panizza, 1995). As a result, neoliberal governments across the region acknowledged political claims for ethnic recognition and institutionalized collective and cultural rights through constitutional reforms as a way of establishing a new social order based on multiculturalism, even though they oversaw the introduction of a political economy that penalized the poor (Hale, 2005; Sieder, 2002).

In Bolivia, besides institutionalizing new territorial regimes for indigenous peoples (*Tierras Comunitarias de Origen*, TCOs) (Assies et al., 2001), the neoliberal constitutional reform strengthened the decentralization process, indirectly encouraging the political organization of traditionally marginalized sectors and the formation of ethnic-based political parties (Van Cott, 2007: 128). And Bolivia was far from unique in this respect. Between late-1990s and early-2000s, political leaders who proclaimed their own ethnicity with pride or who represented organized indigenous movements gained access to national parliaments and control of local and subnational governments in Colombia, Ecuador, Guyana and Venezuela as well as in Bolivia. The new politics of ethnicity seemed to offer the opportunity to deepen a process of democratization that had been dominated by traditional elites and, at the same time, promised to shift resources towards the poorest and most marginal social groups. For this reason, the rise of indigenous parties was greeted as an important achievement not only in terms of political inclusion for indigenous peoples but also for the quality of democracy and participation in the region (Van Cott, 2009; Postero, 2006; Webber, 2011).

In most cases, notably the Movimiento al Socialismo (MAS) in Bolivia and the Movimiento Unidad Plurinacional Pachakutik (MUPP) in Ecuador, ethnic-based parties did not pursue an ethnocentric and exclusionary program. Instead they tended to articulate ethnic claims along with classic populist electoral strategies that appealed to diverse sectors of the electorate. This apparent contradiction can be explained, at least in part, by the ambiguity and fluidity of ethnic identities in the region, which incentivized the need for new parties to develop inclusive agendas and styles (Madrid, 2012), at least during electoral campaigns. At the same time, however, the resurgence of identity politics also created centrifugal tendencies, and led to the emergence of

“ethno-territorial projects” in which essentialized discourses of identity were put to work in order to legitimate claims to territorial and political rights. In Bolivia, two emblematic examples here are the *ayllu*⁴ movement that represents the interests of Aymara peoples of the highlands, and the lowland autonomy movement, which calls for the creation of a ‘*camba* nation’ controlled by Santa Cruz white elites (Perreault and Green, 2013; Gutiérrez Chong, 2010). These tensions between nationalist and localist projects were also embedded in the new Constitution, which was approved following a referendum in 2009. The Constitution refers to plurinationalism in Bolivia as a “transterritorial articulatory process”, thus emphasizing its potential to revitalize the nation-state, and, at the same time, incorporates models of subnational autonomy (*autonomías*) which reflect the “intensification of localizing cultural sentiment and citizen rights claims tied to regionally-specific political-economic, labor, and natural resource formations” (Gustafson, 2009: 989). The Constitution also introduced a new broader ethnic subject: the ‘*nación o pueblo indígena originario campesino*’ (the indigenous native peasant nation or people) defined as “each and every human collectivity that shares cultural identity, language, historical tradition, territorial institutions and view of the world, and whose existence is previous to the Spanish colonial invasion” (Art.30). This new subject can now claim a specific type of territorial autonomy, the *Autonomía Indígena Originario Campesina* (AIOCs), as well as other specific rights associated with customary justice and cultural integrity (Tockman and Cameron, 2014; Tomaselli, 2015).

Overall, then, new practices of ethnic-based participatory governance have been introduced in Bolivia, and indeed in other countries of the region, since the 1990s. It is in this context that consultation mechanisms, such as those envisaged by FRIC, acquire their importance as a key instrument through which democratic agreement can be reached especially in relation to potentially contentious development projects in the areas of resource governance and planning (McNeish, 2010). But while ethnic-based participation has the potential to strengthen processes of inclusion and indigenous participation, in the resource sector especially, the right to identity and voice are embedded in complex political, social and economic contexts that shape how they are interpreted and implemented. New ethnic-based rights are not simply a neutral good for democracy; as Sawyer and Gomez (2008: 5) write: “seeking and acquiring indigenous rights is not in and of itself emancipatory. Rather, it recalibrates the area of struggle”. These struggles shape the concrete meaning FPIC initiatives and other forms of consultation acquire.

FPIC and the New Frontier of Indigenous Participation

Across the world, indigenous peoples inhabit and claim land rights in areas that are environmentally protected and often extraordinarily rich in terms of biodiversity and both renewable and non-renewable resources. In Latin America, it is estimated that

⁴ In the highland culture, a kinship-based social unit which possesses a specific, continuous or discontinuous, territory.

indigenous communities manage approximately 25 per cent of the Amazon basin, one of the most biodiverse regions in the world (Van Dam, 2011). A further 24 per cent of the region's protected areas overlap with indigenous territories (Sabogal et al., 2008). There are large reserves of oil and gas, many of them yet untapped, across these biologically and culturally diverse territories. In recent years, record oil prices, growing global demand, new technologies and commodity-based national economic strategies have led to unprecedented levels of natural resource exploration and extraction in these areas (O'Rourke and Connolly, 2003; Hinojosa et al., 2015). The result is both a new kind of politics that encourages the deployment of indigenous symbols and culture (Grugel and Riggirozzi, 2012) alongside massive environmental and social disruption due to deforestation, drilling platforms, pipelines and pollution. Not surprisingly, these development projects have become increasingly contentious, given the scope and magnitude of planned activities (Finer et al., 2008; Sawyer and Gomez, 2008).

Latin American states have resisted ceding valuable ownership over subsoil natural resources. But they have put in place a range of reforms to devolve certain land and natural resource management rights to indigenous peoples. These efforts are supported in international human rights law, in particular by ILO Convention 169 (C.169, 1989), the only binding treaty on indigenous rights, and by the United Nations Declaration on the Rights of Indigenous People (UNDRIP, 2007). Together with a growing body of jurisprudence, these instruments seek to codify, promote and protect indigenous rights globally. They set out a multicultural model of the state in which indigenous peoples' cultural distinctiveness and integrity is formally recognized and protected, including their rights to land and resources as well as governance through indigenous customary law and institutions. In addition to protecting indigenous peoples from discrimination, international norms grant them collective rights to maintain and develop their unique cultural identity (Anaya, 2004). According to the UNDRIP, indigenous peoples should also be able to freely negotiate their own political status and representation and to pursue their economic, social and cultural development within the states in which they live (Anaya, 2009).

The FPIC framework is a response to the growing claims for cultural integrity and self-determination and the fact that the rights of indigenous peoples are rising up the international agenda. It is designed to provide a mechanism to regulate and operationalize the participation of indigenous peoples in environmental decision-making and political processes on questions where their interests are directly affected (Ward, 2011). While there is no single internationally agreed definition of FPIC nor a one-size fits all mechanism for its implementation (Schilling-Vacaflor and Flemmer, 2013; UN-REDD, 2013), references to the need to consult or to obtain consent from indigenous peoples is mentioned in all main human rights instruments on indigenous rights. Art. 6 of C.169 states that:

Governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures, which may affect them

directly. (...) The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

A recent ILO Handbook on C.169 tries to clarify some of the conflictual issues raised by the Convention and clearly places emphasis on the *right of indigenous peoples to be consulted*, although it does not suggest that consent is necessary and it does not invest indigenous peoples with veto power: “Convention No. 169 does not provide indigenous peoples with a veto right, as obtaining the agreement or consent is the purpose of engaging in the consultation process, and is not an independent requirement” (ILO, 2013: 16). UNDRIP, meanwhile, explicitly calls for the “free prior and informed *consent*” (FPIC) of indigenous peoples, and sets out the circumstances when this is required, namely: relocation of the population (Art. 10), impact on culture and intellectual property (Art. 12), adoption and implementation of legislative or administrative measures (Art. 19), exploitation of lands, territories and natural resources (Art. 27), disposal of hazardous waste (Art. 29), and development planning (Art. 30). In addition, the Cartagena Protocol on Bio-Safety (2000) to the Convention on Biological Diversity seeks to attach FPIC to the transboundary movement, transit, handling and use of all living organisms (EMRIP, 2011). In short, FPIC is now talked of in connection with a very broad set of issues, although thus far it has been applied mainly in relation to natural resource exploitation. The UNDRIP also specifically refers to the three main attributes that characterized consent: ‘free’, ‘prior’ and ‘informed’. According to the Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent (E/C.19/2005/3), endorsed by the United Nations Permanent Forum on Indigenous Issues in 2005, ‘free’ means that there must be no “coercion, intimidation or manipulation” (2005: 46) and that the process is self-directed by indigenous communities themselves; ‘prior’ implies that “consent is sought sufficiently in advance of any authorization or commencement of activities” (2005: 46); ‘informed’ refers to the nature of the engagement and type of information that should be provided and delivered according to specific criteria, including clarity, consistency, transparency, cultural sensitiveness and linguistic appropriateness. Because it is so recent, FPIC is international law-in-the-making and, as such, it contains some confusion about the value and purpose of consultation, the nature of consent and the arenas where it is required, something that the ILO itself has recognized:

We got stuck diagnosing the problem and we overlooked how to resolve it. C.169 is a broad norm that leaves issues that are highly sensitive and where indigenous communities are waiting for clear answers to the post-ratification stage and (...) national legislation (...). This is particularly true in the case of prior consultation. The ILO thus did something it rarely does: it published a handbook on how to understand a Convention. (...) This is because one of the ILO’s major challenges at the moment is to provide tools to states, to stop analyzing the problem and to start offering solutions (interview with ILO officer, Geneva, March 2015).⁵

⁵ All interviews’ translations from Spanish are by the authors.

Still, in spite of its legal ambiguities, FPIC is increasingly being put to use. The United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation (UN-REDD) recognized FPIC as a key instrument for sustainability (UN-REDD, 2013; Sunderlin et al., 2014). FPIC experiments have been introduced in a number of countries including Suriname, Guyana, Tanzania, Malaysia, Philippines, Indonesia, and Australia. But it is in Latin America above all – and especially Bolivia and Peru – where attempts to use FPIC to institutionalize collective rights are most advanced. Both Bolivia and Peru moved quickly to constitutionalize FPIC mechanisms (*Consulta Previa Libre e Informada*) and both have pushed on with the challenge of operationalizing it. In Peru, a FPIC Law (N° 29785) was approved in 2011, while in Bolivia a Draft Law has been widely debated and is awaiting parliamentary consideration. The success, or otherwise, of these initiatives are, therefore, of huge significance for whether FPIC will work as an instrument to embed better participatory governance and allow a greater say in the management of territory and the environment for indigenous peoples everywhere.

Towards a FPIC Law: The Bolivian Case

FPIC arrived in Bolivia at a moment of rising demand for, and recognition of, indigenous rights. Bolivia ratified ILO 169 Convention on the Rights of Indigenous and Tribal Peoples in 1991 (Law 1257) and formally incorporated UNDRIP as a national law in 2007 (Law 3760). The obligation to consult the country's indigenous peoples was established via the Hydrocarbon Law (3058) of 2005, which states that: “native, indigenous and peasant communities and peoples (...) should be consulted in a prior, mandatory and timely manner when it is intended to develop any hydrocarbon activity (...)” (Art. 114). Consultations shall be conducted in good faith by the competent governmental authorities in accordance with the circumstances and characteristics of each indigenous people (Art. 115). Between 2007 - with the passing of the Supreme Decree 29033 to regulate consultations in the hydrocarbon sector - and 2012, 26 consultations were conducted, mainly on gas exploitation and extraction (Schilling-Vacaflor, 2013b). In the meanwhile, FPIC mechanisms were also included in Bolivia's 2009 Constitution, which sets out the right to *consultation* specifically in relation to the *exploitation of non-renewable natural resources* (Art. 30). This article is a watered-down version of the preliminary and more radical draft which promised that *consent* from indigenous communities would be required and would be binding in all resource-related activities (Bascopé Sanjinés, 2010). The creation of a legal obligation to prior consultation was hugely significant for the natural resource economy both because of the growing mobilization of indigenous communities and the unprecedented value of the natural resource sector given the high commodity prices since the early years of the twenty-first century⁶.

⁶ Bolivia, where commodities account for 90 per cent of the country's exports, has experienced a real economic bonanza and has managed to combine high commodity prices with relatively cautious

FPIC has thus come at a complex and delicate moment for Bolivia, when the government wishes to take advantage of Bolivia's natural resources because of high international demand and, at the same time, is engaged in a process of institutionalization of new rights and autonomy regimes for indigenous peoples. Equally, the challenge in Bolivia – and indeed in other countries where FPIC is being introduced – is that the opportunity to institutionalize ethnic participation and voice over the use of territory and natural resources run the risk of intensifying social conflicts. This is a risk because of the accumulation of tensions from the past, and the absence of trust in the state to act in an independent and accountable manner and faith in its capacity or willingness to oversee participatory consultations in a neutral and fully democratic way. Meanwhile, it has to be recognized that the task facing the government is hardly an easy one. It must represent the interests of all citizens and manage conflicts between groups with opposing interests yet, at the same time, there are inevitably demands from social groups that expect the government to be 'on their side' that it shore up the interests of its own electoral constituency and respect the mandate that took it into office.

A clear example of the challenges of reaching democratic solutions to these conflicting interests and claims came with the conflict around the Isiboro Sécure National Park and Indigenous Territory (TIPNIS). In 2011, the Bolivian government announced a plan to construct a road through the TIPNIS as part of a Brazilian-led network of mega-projects aiming at generating development throughout the continent. The announcement triggered mass mobilization by lowland indigenous peoples, who, supported by environmental NGOs and urban activists, set off on a protest march to La Paz. Indigenous communities argued that the designation of TIPNIS as a park and an indigenous territory should protect it from mega-development projects and gave them the right to be consulted. Tensions then developed between the indigenous groups and the peasant and coca-growers' unions (mainly Aymara and Quechua settlers), who saw the road as a way of expanding the agrarian frontier, a process from which they would benefit (Perrier Bruslé, 2012; McNeish, 2013; Webber, 2012). The conflict generated international attention, which pushed the government into holding a consultation, the outcome from which favored the road building. The consultation has not resolved the conflict however – the indigenous communities, who demanded consultation in the first place, feel betrayed and refused to participate, while the outcomes have been questioned by an independent assessment led by the Catholic Church (Comisión Interinstitucional de la Iglesia Católica et al., 2012; Sub-central TIPNIS Comisión de Recorrido, 2012).

The TIPNIS conflict reveals the difficulties of using consultations as a way to manage disputes where economic and cultural interests are at play. Rather than resolving the issues, the consultation actually exacerbated tensions between the state and social organizations, with some activists criticizing the weakness of the indigenous rights framework and the government as willing to hear only some voices

macro-economic management, despite the introduction of some measures of redistribution (IMF, 2014).

and claims. As the Director of CEJIS, one of the Bolivian NGOs involved in the TIPNIS conflict, told us:

The TIPNIS demonstrates a step back from the rights of indigenous peoples linked to collective rights. For example, the issue of consultation is one of those rights. The government has interpreted the consultation as suits them, more in favor of their own base (La Paz, August 2013)

The point the Director of CEJIS is making becomes clearer if we unpick some of the background to these tensions and conflicts. Rural communities in Bolivia are, and have historically been, significantly fragmented, culturally and politically. After a period of ‘forced top-down articulation’ after the National Revolution in 1952, when indigenous peoples were incorporated into the unionist system and pre-existent autochthonous organizations especially were significantly weakened, peasant and indigenous movements took quite different paths, organizationally and ideologically, especially after the 1980s. With the emergence of the doctrine of *neo-indigenismo*, new ethnic-based social organizations (CIDOB and CONAMAQ) were created. At the local level, communities decided either to join the new indigenous movement or to maintain their affiliation to the peasant federation, except in certain areas, especially in the highlands, where both types of organization co-existed (Rivera Cusicanqui, 1993; Gordillo, 2000). The multiplication of social movements that command real political resources intensified competition between opposing groups over control of local political institutions, land, and, in the end, over who would make decisions about development strategies and environmental management (Fontana, 2014c)

Overall, these conflicts have been marked more by political differences than ethnic divisions. The identity boundaries between *indigenas* (indigenous from the lowlands), *originarios* (native from the highlands)⁷ and peasant organizations are, in practice, very fluid and they have continually engaged in games of alliances and conflicts with each other that are, above all, about political positioning. So, most members of peasant organizations are actually of Quechua or Aymara origin, while most indigenous and native peoples have very similar livelihoods to those of peasants and, until recently, were members of peasant unions (Gustafson, 2002; Canessa, 2007; Fontana, 2014c). As a member of CONAMAQ told us, the difference between indigenous and peasant “is a political rather than a biological issue. They [the peasants] understand ‘the indigenous’ and clearly they are indigenous. But they do not want decolonization. They are afraid to go back to the *ayllus*” (interview, La Paz, August 2013). There are cases, however, in which some peasant unions (e.g in the department of Chuquisaca) have started to call themselves ‘native peasant’ (*originario campesino*) to highlight their autochthonous identities and cultural roots

⁷ In Bolivia, indigenous organizations from the lowlands tend to self-identify with the category *indígena* (indigenous) while indigenous organizations from the highlands rather use the concept *originario* (native). Although in English ‘indigenous’ and ‘native’ have very similar meanings, we are using this translation in the effort to mirror the difference reflected in the language of local actors in Bolivia.

in opposition to more recent settlers (also of Aymara and Quechua origins), and others where CSUTSB communities are actually undergoing a process of conversion into *ayllus* (e.g. San Andrés de Machaca, La Paz Department).

Initially the political project of the governing party, the MAS, was to reconcile indigenous and peasant sectors, but in practice its ties are stronger with the peasantry (Do Alto, 2011; Zuazo, 2009). Furthermore, Morales's attempt to balance his commitments to both sectors diminished over time (Fontana, 2013) and a crisis was reached with the TIPNIS conflict. As a result, the loyalty of the peasant movements to the MAS government have been strengthened, while indigenous and native organizations are now engaged in continuous confrontations with the Executive, at times with the support of opposition parties. Their anger at what they see as a betrayal of the promises that took MAS into government is palpable:

During the first term, the government took note of the indigenous movement, but the second period of Evo Morales has been a total disgrace for native indigenous peoples, because the government has created norms against their interests, for example the Framework Law of Autonomies does not reflect the sentiments of indigenous peoples. (...) On the contrary, it promotes colonization, making us subject to institutions that are not our own (interview member CONAMAQ, cit.).

Not only is the relationship with the government, and between indigenous and peasant sectors tense, but, since the TIPNIS conflict, social movements in Bolivia have also undergone fragmentation and internal conflict, leading to divisions within indigenous/native organizations such as CIDOB and CONAMAQ, with one branch remaining close to government and the other taking up more critical positions. These conflicts have intensified tensions, particularly in the lowlands, over who controls the subsoil resources that mainly lie on indigenous (especially Guaraní) land – the areas where most consultations have taken place so far (Bebbington and Bebbington, 2010; Schilling Vacaflor, 2013b).

Participation for Whom? Tracing Boundaries and Distributing the Benefits of FPIC

The conflicts around FPIC in Bolivia, then, are generated by a combination of context, namely sudden and unprecedented economic bonanza at a time of rising claims based on indigeneity, alongside the fact that FPIC acts as lightning rod for longstanding tensions between different social and political groups over territory and for access to political and economic resources. FPIC has not 'invented' these conflicts; but it has certainly magnified them.

It is not by chance, therefore, that a national debate around a FPIC Law started as a result of the TIPNIS conflict, when it became clear to both the government and social groups that having a national regulatory framework in place would be of crucial importance. The final version of the Draft Law (August 2013) before being submitted for parliamentary approval, took twelve months of talks between the government and the main rural organizations, indigenous (CIDOB and

the Guaraní People Assembly APG), native (CONAMAQ) and peasant (CSUTCB, its female branch, Bartolinas, and the Syndicalist Confederation of Intercultural Communities of Bolivia, CSCIB⁸), at moments when, as we explained above, these organizations were experimenting high levels of conflict and internal fragmentation⁹. The climate of the negotiations was, consequently, tense, with indigenous leaders claiming that they were not being listened to:

I think the framework law has not been debated (...) with the internal organs of the indigenous peoples. (...) The project violates the rights of indigenous peoples (Adolfo Chávez, president of the 'CIDOB oposidora', La Razón, 18 May 2014).

The government, for its part, was complaining about the opportunistic, non-collaborative and even malicious attitude of indigenous organizations, whose expectations were excessive due to the “unreasonable precedents” set by consultations led by transnational companies:

There is a complete distortion by indigenous peoples on the implementation of the right to consultation caused by the bad practices that we had in the past. This right has been corrupted, distorted, commodified (interview with Director of the Unit of the Ministry of Government in charge of the FPIC Law Consultations, La Paz, August 2013).

It is not surprising that the government found it difficult to manage the competing demands that were articulated, for, in the end, at the heart of the conflicts over the FPIC Law was the conflictual question of who has the right to be consulted, with the implication that some groups had more rights than others. Art. 17 of the first FPIC Draft Law prepared by the government stated that *indigenous native nations and peoples of the TCOs* should be the subject of FPIC, while *indigenous native peasant peoples, intercultural communities and afrobolivians* are entitled to a more generic and less demanding public consultation - which, in fact, according to the Constitution, should be a right for all Bolivians (working document, Ministerio de Gobierno, 2012). But this proposal provoked a massive stand-off between the government and social organizations, since some would have more voice than others. The peasant, intercultural and afrobolivian leaders argued that they have the same right to FPIC as much as indigenous/native groups. As the Secretary of International Affairs of the CSUTCB told us:

There is no understanding between indigenous and peasants. The indigenous representatives say: “We have the right to consultation, as ‘indigenous native peasants’, because we have TCOs, but the peasants don’t. They have no right to

⁸ A peasant union of lowlands and valleys mainly formed by people of highland origin (Aymara and Quechua). It was founded on 1971 as the Syndicalist Confederation of Colonizers of Bolivia and decided to change the name after Morales’ victory 2005 and the launch of a ‘process of decolonization’.

⁹ At the time of the negotiations, CONAMAQ was not formally split in two branches yet, while CIDOB’s separation happened in those months. In the latest phase of the talks, the government was therefore dialoguing mainly with the branch closer to the Executive.

consultation because they have no [collective] land, no TCO, they have individual lands". (...) But we want to be considered *equal* to the indigenous brothers. That is, if a road or something is going through a peasant community, we are entitled to be consulted (interview, La Paz, August 2013).

The CONAMAQ, CIDOB and the APG, meanwhile, would only agree to the inclusion of the *indigenous/native peoples and nations*, as the 'true' subjects to benefit from consultation, thereby excluding all other rural groups (APG and CONAMAQ's Draft Law proposals). Indigenous leaders repeatedly appealed to international agreements on this matter, claiming that peasant organizations do not meet the criteria of authenticity, nativeness and a pre-colonial existence:

C.169 (...) clearly says that indigenous native people must have historical continuity, and the *peasants have no historical continuity*. Those international standards must be taken into account in the discussion about consultation (interview with CONAMAQ leader, La Paz, July 2013, emphasis our own).

The conflicts over FPIC in Bolivia thus go to the heart of the dilemmas around collective rights, where the boundaries are to be drawn in relation to the 'collective' and who is the subject of the rights being claimed. These issues are presented in a remarkably unproblematic fashion in C.169. Indeed they are almost exactly as the CONAMAQ leader set out above. From a legal perspective, the category of 'indigenous peoples' is not regarded as especially complex (Eversole et al., 2005), yet in fact ethnicity is a profoundly historical and sociological process. It is rare in practice that there are clean lines separating 'ethnic' communities from each other. The 1986 UN Sub-Commission on the Prevention of Discrimination of Minorities identified indigenous peoples as sharing the common and distinctive traits as the original inhabitants of a land later colonized by others; being socially marginalized in distinct ways; and holding fast to unique ethnic identities and cultures. But this assumes that, prior to colonization, no movement or mixing of peoples took place and that, after colonization, communities remained fully and straightforwardly distinct. In fact, who claims indigeneity depends mainly on historical, cultural and geopolitical context-specific factors. In an effort to adapt the definition of indigenous peoples beyond Latin America, the Working Group on Indigenous Peoples/Populations of the African Commission on Human and Peoples' Rights (ACHPR) and the International Work Group for Indigenous Affairs (IWGIA) have argued that self-determination rather than aboriginality should be considered as a key criterion for identifying indigenous peoples. This principle does not have a direct link with colonial domination but only "requires that peoples identify themselves as indigenous and as distinctly different from other groups within the state" (ACHPR and IWGIA, 2006: 10). Self-identification, however, does not resolve problems of justifying why certain ethnic groups would be entitled to a series of rights, and other groups that might be equally poor and marginalized but, for different (political, cultural, ideological) reasons, are unable to do so, won't. Besides, the self-identification criterion has been already widely applied for the identification of indigenous peoples in Latin America,

for example in national censuses (Barragán, 2009). This maximalist interpretation of indigenous identities has generally prevailed in Latin America, unlike in Africa and Asia where minimalist approaches have meant that very few groups are treated as ‘indigenous’ and the term is chiefly reserved for sparsely populated, traditional nomadic groups.

Going back to Bolivia, part of the conflict was due to the fact that the government tried to limit the scale of consultations by adopting a minimalist understanding of indigenous peoples, in a context where steps had already been taken to institutionalize maximalist understandings of indigeneity in a series of constitutional reforms. In particular, as we mentioned above, within the new ‘plurinational’ regime¹⁰ set out in the 2009 Constitution, the category ‘*indígena originario campesino*’ had already become a pivot of citizenship and, therefore, the allocation of new collective rights (Fontana, 2014b). To try and deny now that the right to be consulted to groups that self-define and are recognized as ‘peasants’ would not only be conflictual but also unconstitutional. The government was eventually forced to recognize these contradictions in the last round of negotiations and, as a result, changed its position. There was, finally, a recognition that:

Organizations have every right to claim rights that the state can fulfill. But organizations have no discretion to restrict rights, at least, and even less, when they are constitutionalized. (...) That is primarily the responsibility of judicial bodies (interview with lawyer and Ministry of Government’s civil servant involved in the FPIC Law consultations, La Paz, August 2013).

The UNDP advisor to the negotiation process (herself of Aymara origin) exercised some influence here, arguing that the consequences of pitting indigenous and peasants against each other would be disastrous for the consultation process itself:

They cannot get rid of the peasants because it is in the Constitution. So the peasants can nullify that law if they file a constitutional complaint. I have talked to them and with indigenous groups, trying to moderate some very extremist attitudes, mainly from the CONAMAQ advisers [some of them members of the NGO CEJIS]. We must raise awareness because extraction will happen, and consultation is needed (La Paz, July 2013).

¹⁰ The Constitution does not include a definition of plurinationality, but according to a preliminary social origins’ proposal: “The plurinational state is a model of political organization for the decolonization of our nations and peoples, reaffirming, recuperating and strengthening our territorial autonomy (...). For the construction and consolidation of the plurinational state, the principles of juridical pluralism, unity, complementarity, reciprocity, equity, solidarity and the moral and ethic principles to stop all kind of corruption are fundamentals” (*Propuesta de las Organizaciones Indígenas, Originarias, Campesinas y de Colonizadores hacia la Asamblea Constituyente*, Sucre, 5 August 2006, <http://www.cebem.org/cmsfiles/archivos/propuesta-organizaciones-indigenas.pdf>). On Bolivian plurinationalism see also Gustafson, 2009; Tapia 2011; Fabricant and Gustafson, 2011; Tockman and Cameron, 2014; Fontana, 2014b.

These conflicts might sound at first glance as though they are as a very Bolivian problem. But in fact, these issues echo debates in neighboring Peru¹¹, and point to more general issues with FPIC. Independent of which social groups should have the right to consultation, there are vital questions that remain unresolved about who should be consulted. Should it be the community, as individuals; should consultation be via the traditional authorities (*jilakatas* or *capitanos*¹², union secretaries), the ‘people’ (for example in this case, Guaraní, Mojeño, Yurakaré, Mozeten) or the leaders of the social organizations (CIDOB, CONAMAQ, CSUTCB, CSCIOB, etc.). This is not a small matter either in terms of democracy or in relation to governance. International law makes reference to a *legitimate representative*, suggesting that traditional leaders should be in charge, whilst, in Bolivia, the Constitution promises that “within the *native indigenous peasant peoples and nations*, the consultation will be carried out with respect given to their own norms and procedures” (Art. 352), offering a range of different options. This is mirrored in the FPIC Draft Law. This lack of clarity opens up the possibility for the state of selecting its partners and thus shaping the outcome. Indigenous peoples and NGOs involved in past consultations have already accused the Bolivian state of trying to influence results through interference (Bascopé Sanjinés, 2010; Pellegrini and Ribera Arismendi, 2012). Furthermore no criteria are provided to assess the legitimacy and representativeness of local institutions. Recent guidelines of the ILO on C.169 try to be more specific on this issue, clarifying that in those cases in which the representativeness and inclusivity of traditional organizations can be questioned (for example with respect of women), there is the option of carrying out the consultation through non-traditional institutions or with more than one organization (ILO, 2013). However, in practice, the identification of relevant institutions depends on the good will of both the state and indigenous leaders.

Apart from the ‘subject problem’, other serious disagreements have emerged that challenge the idea that FPIC can work straightforwardly as a way to guarantee a more inclusive, democratic and effective polity. According to indigenous organizations, outcomes should be binding and should always imply consent (*consentimiento*) (preliminary law proposals, CONAMAQ and APG, 2013).

For CONAMAQ, consent means the right of veto. There are at least two cases of jurisprudence at the international level, which recognize that consent of indigenous peoples must be obtained. Therefore there are legal precedents (...) that support our position (interview with CONAMAQ leader, La Paz, August 2013).

¹¹ In 2010 the Peruvian parliament voted a Law on FPIC that recognized that peasant communities *might* as well be subject to consultation, if they meet the following ‘objective criteria’: “1. Direct descendants from country’s indigenous populations; 2. Lifestyle and spiritual and historical ties with the territory traditionally used or occupied; 3. Social institutions and customs; 4. Cultural patterns and life styles different from other sectors of the population” (Art. 7, *Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el convenio 169 de la Organización Internacional del Trabajo*). This is a watered-down version of the social movement’s proposal, following the presidential veto with the argument that, among other issues, peasant communities should not be entitled to consultation (Shilling-Vacagflor and Flemmer 2013).

¹² Traditional indigenous authorities.

However, the government argues that a veto can only be admissible in very specific circumstances that, crucially, would not include the exploitation of natural resources *tout court* (internal document, Ministry of Government, 2013).

They [indigenous organizations] consider consent to mean the power to say yes or no. We understand that the consent has two goals. First - according to international law - the objective of reaching agreements. (...) And then there are the three cases established by international law and jurisprudence, where consent becomes a requirement for the state (interview Director of the Unit of the Ministry of Government, cit.)

Ultimately, for the state, what is at stake is its capacity to make policy decisions in what they see as, or claim to be, the 'national interest', whilst the communities are inevitably more concerned with whether they can use participation and consultation to leverage accountability and increase their own voice in those decisions.

Equally conflictual is the question of reparation, should development projects go ahead in ways that are regarded as damaging to communities. There are, in fact, some longstanding practices in Bolivia of transnational corporations offering monetary 'compensations' in response to claims. Indigenous representatives insist that these funds are used to benefit the community and promote autonomy, although there is little documented evidence of how these funds have been spent (Schilling-Vacaflor, 2013a). Almost inevitably, accusations have been made that indigenous leaders have not been fully accountable and that the payments have ended up as part of the circuits of local corruption (Bascopé Sanjinés, 2010). The question now is whether monetary compensation should be embedded in FPIC or whether other forms of action should be taken. The government certainly is not keen to promote payments to communities. But some groups are convinced that the option of forcing companies to pay is essential to uphold their rights. For the Guaraní, payments of this sort are seen as essential to provide for welfare, education and basis services; their argument is that the state has never concerned itself with the Guaraní people and compensation is the only way to improving social and economic conditions.

There is an expectation that with the issue of compensation, and through the consultation process, they [Guaraní people] will obtain what they haven't got for over 500 years, as a result of this social and political exclusion and exploitation that they have suffered (interview lawyer and civil servant, cit.).

As with so much of FPIC, compensation thus becomes part of a broader and more complex issue to do with the provision of public goods and the relative position of different communities in relation to the state.

To sum up, negotiating the FPIC Draft Law in Bolivia has led to intense discussions between social organizations and the state. The main points of contention (the subject of consultation, procedures and outcomes) highlight, on the one side, the greater power of social groups to make their voices heard and, on the other side, the

growing constraints on the state in determining national development policies. So, in addition to the trade-off between participation and governance efficiency, there are also questions about the boundaries for the access to rights based on identity when access to key resources is also at stake.

The Challenges of Ethnic-based Participatory Governance

Considering all of the above, it is perhaps not surprising that César Rodríguez-Garavito (2011: 266) describes FPIC as “a discussion of legal procedures” that ultimately fails to address the power asymmetries that are embedded in the relationships between the state and indigenous communities, and between indigenous communities and private companies in search of profit from the lands indigenous peoples live on. Yet it is also clear that, despite these limitations, indigenous movements consider FPIC as an asset rather than a constraint for their collective rights (“it is key so that our rights are not violated”, interview CONAMAQ leader, La Paz, August 2013), and see it as an important mechanism to regain some control over territory and resources. For instance, the negotiation over the law as well as the TIPNIS conflict were regarded as crucial in terms of setting precedents that reflected the rights of indigenous movements in Bolivia and beyond:

If the native indigenous movement manages to beat the government in the TIPNIS consultation, then it will be a good precedent for all the native indigenous movements nationally and internationally, because its echo will be felt outside Bolivia. (interview with CONAMAQ leader, La Paz, August 2013)

FPIC discussions are thus shaped by the demands made by each group as it seeks to push interpretations that stand a chance of leading to more autonomy, power in decision-making, greater control over territory and economic benefits for its communities. But, at the same time, sitting underneath these discussions, and indeed FPIC as a whole, are broader questions of participation and democratic citizenship, which actually are also part of its legitimization.

FPIC is rooted in the international human rights framework via the C.169 and UNDRIP, and is, as such, part of the drive to bring rights into democratic governance. The C.169 was itself the outcome of considerable mobilization nationally and internationally to demand a recognition of indigenous rights (Engle, 2010). Indigenous rights claims were genuinely transformative in Latin America and were part of a new understanding of citizenship (Postero, 2006). But is equally the case that international rights discourses do not always translate directly and easily into national contexts – the politics of translation mean that it is possible for groups to claim rights in ways that international legislation did not anticipate or foresee. International rights discourses, in other words, do not ‘solve’ problems of politics.

What this means is that FPIC is not clear as to which ‘indigenous peoples’ it seeks to protect and has nothing whatsoever to say to groups who might have needs or feel they have claims but who cannot be (or resist being) defined in ethnic terms.

FPIC offers partial redress for profound, historical marginalization; but in so doing it embeds a potentially powerful exclusionary ontology and runs the risk of violating the notion of equal national citizenship (Adelson et al., 2003). Prioritizing the voices of excluded groups over those of others can of course be justified democratically. Arguments could be made that indigenous peoples' livelihood and culture are more dependent on their relationship to their territories and customary lands than other communities, and might well be persuasive. But the force of this argument depends on those groups formally recognized as indigenous being *uniquely* vulnerable; and in the case of Bolivia – and indeed Latin America in general - it is hard to make this argument. As Goodland (2004: 69) asks: “Why is it that the rural poor can be displaced against their will, but other peoples cannot? Can development have a double standard and advocate democracy for some, but autocracy for the rest?” In other words, FPIC really rests on an assumption of clearly identified and static cultural identities, and the existence of straightforward division between the powerful and the dispossessed along these static ethnic lines, when most ethnic identities are in fact fluid social constructions, dependent on politics and subject to change (Lucero, 2006; Li, 2000; Posner, 2004; Sylvain, 2002).

Moreover, the performative potential of political and legal reforms that promote ethnicity needs to be taken into account. In Bolivia, three decades of claims and concessions around ethnic recognition has embedded incentives for many social groups to claim indigeneity for the sake of redistribution and access to resources and autonomy (Fontana, 2014a; McNeish, 2012 and 2013). Yet there is within FPIC an expectation that communities and individuals will somehow act for a ‘collective’ good and that people will simply put aside the potential for private gain, and indeed a view that they may not even have individual interests (Masaki, 2010). This has contributed to strengthen the dichotomy that separates ideas of ‘economic development’ from ‘indigenous’ political economies suggesting that indigenous people are intrinsically traditional (not modern), pre-capitalist (not market-focused) and uniquely in favor of collective rights (rather than having a preference for individualism). In fact, it should hardly be surprising that, faced with situations of poverty and exclusion, indigenous communities might come to regard FPIC as a way of getting access to funds and projects to improve their material conditions; and it is almost certainly scholarly ‘otherization’ of indigeneity that leads to expectations of harmony from the process, not ‘normal’ political conflict. Although the international framework allows for a broad understanding of FPIC which includes any measure that would affect indigenous peoples, in practice, this mechanism is often shaped as a content-specific participatory mechanism for the allocation of nationally strategic resources to ethnically defined social groups, and as such it seeks to partially redefine the locus of control of natural resources. It is not by chance that FPIC in Bolivia acquired meaning precisely when it was included in the Hydrocarbon Law. The redistributive dimension is therefore crucial – and understood as such by indigenous communities in Bolivia – yet it is often hidden behind a rhetoric of recognition (Castree, 2004), and has, therefore, been largely neglected in discussions of political economy. As Agrawal notes, we do not really understand the redistributive

consequences of participatory institutions or the extent to which such mechanisms are more equitable than the systems they seek to replace:

Typically, intuition as well as much of the scholarship on the commons suggests that fairer allocation of benefits is likely to lead to more sustainable institutional arrangements. But in a social context characterized by highly hierarchical social and political organization, institutional arrangements specifying asymmetric distribution of benefits may be more sustainable even if they are entirely unfair (Agrawal, 2003: 244).

This view has been reinforced by the oversimplified understanding of local communities (as small, integrated groups using local norms to manage resources sustainably) embedded in mainstream environmental conservation literature, which fails to account for local politics, strategic interaction and conflict within and between communities (Agrawal and Gibson, 1999). In fact, local (indigenous) communities do not always respect democratic principles and are not always a repository of the ‘common good’ (Arnold and Spedding, 2005; Thede, 2011; Yashar, 2007, Alpa Shah, 2007; Kuper, 2003; Thede, 2011). The extent to which indigenous communities operate along democratic lines depends in practice on a variety of factors, including the quality and effectiveness of their institutions and norms (Agrawal and Gibson 1999).

Institutions are therefore crucial in determining the procedures and outcomes of participatory processes. When deliberative mechanisms are weak, FPIC is likely to become an exercise of strategic bargaining rather than an inclusive process with the ‘collective’ interest at the center. This is exactly what has happened in many of the consultations conducted so far in Bolivia (Schilling-Vacaflor 2013a, Bascopé Sanjinés, 2010). Yet, by assuming that indigenous groups have internal mechanisms for conflict-resolution and that their decision-making processes are intrinsically legitimate, inclusive and non-authoritarian, the chance for any proactive engagement to strengthen local institutions is lost. Indeed, while C.169 mentions the need to “establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose” (Art 6), in practice, this provision has been scarcely debated and even less applied, and discussion has instead focused overwhelmingly on FPIC as a tool of empowerment that can work in any circumstances and context. This is despite the fact that recent studies show that assumptions embedded in romanticized views of ‘traditional authorities’ downplay the complexity and fluidity of institutional legitimacy and the fact that, in certain cases, “choosing the correct, downwardly accountable institution to represent those receiving rights may not be an option” (Larson et al., 2015: 236) at all. In practice, not only are some participatory mechanisms less inclusive and democratic than they claim to be, but those mechanisms sometimes rely on inadequate or non-existent institutions. In some cases, new ‘traditional forms of governance’ are required and have to be created brand new. A recent example in Bolivia is the process of institutionalization of some AIOCs

where, in certain cases, the absence of representative local institutions meant that communities have opted to create municipalities:

When this process started [creation of the AIOCs], they [the government] thought “these [indigenous peoples] have their own governments, it will be easy because they will do what they have always done”. But it does not work like that in practice. (...) The autonomous statutes of some native communities (...) is in fact a copy of the municipality. (...) Instead of deepening and empowering their own system, they keep fighting for whom is the Executive, the Legislative, who the mayor and who the local councilor (interview with officer Fundación Tierra, La Paz, August 2013).

In other cases, traditional representative mechanisms do not work when transposed to local government:

In many places, indigenous assemblies are held once a year, but this no longer makes sense, because things [need to be] done. Thus people are now suggesting having an assembly every month of all the communities (interview with officer Fundación Tierra, cit.).

As with other processes of citizenship creation, FPIC relies on local institutions working properly. Paying more attention first to how these institutions work in the first place would, logically, produce better FPIC regulation.

Conclusions

Interest in FPIC initiatives is growing for reasons that range from efforts to build more equitable management of natural resources to attempts to introduce more effective local-scale practices of participation and active citizenship. But as we have tried to show here, using Bolivia as an example, FPIC is not a neutral, apolitical exercise that will somehow straightforwardly lead to better or more democratic governance. In particular, there are major concerns about whether FPIC can act as a mechanism to expand democratic inclusion and participation in societies where there are high levels of already existing ethnic politicization. The way in which FPIC is currently being implemented and framed in Bolivia is in tension with broader ideas of representation and legitimacy, inclusiveness and management of public and common goods because there is no real clarity as to who is entitled to participation, why they do and whether they are doing so as a corrective to exclusion, a promotion of citizenship or as a mechanism for redistribution. As a consequence, there are democratic concerns as to whether FPIC-related decisions will be made in the interest of the majority of citizens, or even the majority of the poor. Without efforts to mediate between social groups and to take into account local dynamics, there is a risk that FPIC might well even introduce new forms of inequality. FPIC’s place within the broader framework of democratic governance is thus at worst questionable and at best unclear.

We do not, of course, wish to argue against local consultation *tout court* or against ethnic-based political representation. The positive effects of ethnic political representation on democracy, community wellbeing and social inclusion in Bolivia and elsewhere are evident (Díaz-Cayeros et al. 2014; Postero 2006). We recognize that there are strong arguments in favor of decentralization of environmental planning and we acknowledge the potential that FPIC has to embed new spaces of dialogue and decision-making. Communities that have suffered longstanding marginalization might also directly benefit from the access to new resources or compensatory measures targeted to improve social services and livelihoods. But we also have to recognize that FPIC is not a magic solution to problems of participation and that emphasizing localized decision-making can sometimes buttress the power of local elites, create non-accountable institutions and have negative implications for other vulnerable groups (Lane, 2003; Ehrenberg, 1999; Goodland, 2004). It can also trigger depoliticizing effects on contentious processes and become a “technology of government” unable to account for the aspirations and decisions of local communities (Perreault, in press). It is clear, at the very least, that far more attention to community micro-politics is required in order to understand how the new participatory frameworks might actually work in practice.

The way in which the discussion around FPIC in Bolivia has been framed highlight three issues that should be carefully considered while rethinking ethnic-based consultation mechanisms both domestically and internationally. Firstly, efforts should also be directed to strengthening representative and democratic local institutions. In other words, respecting indigenous rights should not imply giving up on the democratization agenda. Secondly, state capacity in conflict management should be improved, allowing accountable state institutions to play an active role in mediating the relationship between different actors and guaranteeing an equitable outcome in consultation processes. Finally, the performative effect of FPIC on social and political boundaries around ethnicity (indigeneity) should be considered. Those boundaries are not always erected or imposed by the state, and they can be the result of the effort of social groups to gain exclusive access to certain rights, resources and power. Whether this would be justified as compensation for past injustices or as empowerment of vulnerable groups, any limitation in access to new rights and participatory spaces should be carefully evaluated and agreed between the state and an inclusive range of social actors, and consistency between the means and goals of participatory measures should be ensured.

From a theoretical perspective, the complexities around FPIC challenges assumptions that there is somehow a linear relationship between democracy and ethnic-based rights claims. The introduction of new ethnic-based rights to *voice* does not automatically lead to a more equal society. This is particularly the case where new rights claims imply access to strategic and material resources. We call, therefore, for further, grounded research on how FPIC actually operates in different domestic contexts in order to understand more fully the challenges, as well as the opportunities, it presents as an instrument of inclusive participation, distribution, equity and, not least, democracy.

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Laws and International Conventions

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Convention on Biological Diversity (CDB), 1992

www.cbd.int/doc/legal/cbd-en.pdf

United National Declaration on the Rights of Indigenous People (UNDRIP), 2007

http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Bolivan Law N°1257, 11 July 1991

<http://www.gacetaoficialdebolivia.gob.bo/normas/view/21748>

Bolivia Law N°3760, 7 November 2007

<http://www.ine.gob.bo/indicadoresddhh/archivos/trab/nal/Ley%20N%203760.pdf>

Bolivian Law N°3058 – Hydrocarbon Law, 17 May 2005

<http://www.lexivox.org/norms/BO-L-3058.html>

Bolivian Law N° 031 Framework Law of Autonomies and Decentralization, 19 July 2010

<http://www.ine.gob.bo/indicadoresddhh/archivos/alimentacion/nal/Ley%20N%20031.pdf>

Constitution of the Plurinational State of Bolivia, 7 February 2009

<http://www.ncpe.org.bo>

Peruvian Law N° 29785 Law for the right to prior consultation to indigenous or native peoples, 26 September 2011

www.snmpe.org.pe/nuestros-sectores-snmpe/hidrocarburos_nuestros_sectores/legislacion/medio-ambiente-y-comunidades/ley-n-29785-ley-del-derecho-a-la-consulta-previa-a-los-pueblos-indigenas-u-originarios.html